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82-1732

No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT F. BROWN and RFB PETROLEUM, INC.,
a Texas Corporation,

Petitioners,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., a Colorado Corporation, R. STEPHEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE and ROBERT NORWOOD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 18 U.S.C. § 3651 and Rule 57(b) of the Federal Rules of Criminal Procedure grants implied powers to permit for the first time creation of receivership by criminal courts?

2. Whether the establishment of a receivership in the criminal action deprives judgment creditors of equal protection under the Fifth Amendment to the United States Constitution?

3. Whether the assets of a jurisdictionally invalid receivership can be siezed by process emanating from another court?

PARTIES BEFORE THE APPELLATE COURT

Robert A. Brandt, Robert C. Herzfeld and Elizabeth Eken, as representative of a class of investors defrauded by Trenton H. Parker and the International Mining Exchange, Inc., are additional parties that appeared in the proceedings before the United States Court of Appeals for the Tenth Circuit.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States District Court Judge in the consolidated civil action number 80 K 850 and 80 K 859 is contained in Appendix A.

The decision of the United States Court of Appeals dated January 31, 1983 is contained in Appendix B.

The United States Court of Appeals Order dated March 7, 1983 denying Petition for Rehearing and Suggestions for Rehearing En Banc is set forth in Appendix C.

An Order dated March 28, 1983 of the United States Court of Appeals granting Petitioners' Request for a Stay

of Mandate if application is made to the Supreme Court by April 27, 1983 for certiorari is contained in Appendix D.

JURISDICTION

The Judgement of the United States Court of Appeals for the Tenth Circuit, which is the subject of this Writ of Certiorari, was entered on January 31, 1983, Appendix B. The Order denying rehearing by the Court of Appeals was dated March 7, 1983, Appendix C. The United States Court of Appeals Order dated March 31, 1983 stayed mandate until April 27, 1983 pending Petitioners' filing their writs of certiorari with this Court, Appendix D.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

STATUTES AND RULES INVOLVED

18 U.S.C. § 3651, Appendix E, provides in part that:

> "While on probation and among the conditions thereof, the defendant—
>
> . . . .
>
> "May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and. . . ."

Public Law 97 - 291, 18 U.S.C. § 3579, § 5 (a)(4)(d), Appendix F, states in part:

> "The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process."

Rule 57 (b) of the Federal Rules of Criminal Procedure, Appendix G, states:

> "If no procedure is specifically described by a rule the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

Amendment Five of the United States Constitution, Appendix H, provides in part: ". . . be deprived of life, liberty or property without due process of law."

STATEMENT OF THE CASE

On July 3, 1980, Robert F. Brown and RFB Petroleum, Inc. filed their action in the United States District Court of Colorado and it was assigned Civil Action No. 80 K 859. Jurisdiction was conferred upon the United States District Court pursuant to Section 22 of the Securities Act [15 U.S.C. § 77v (a)] and 28 U.S.C. § 1332 and this case was consolidated with 80 K 850 in September 1980. These were civil security actions against Defendants Trenton H. Parker, International Mining Exchange, Inc., and others, based on the offer and sale of fraudulent tax shelter investment securities which the Petitioners had purchased for approximately four hundred fifty thousand dollars ($450,000.00).

On September 8, 1981, a final summary judgment against Defendants International Mining Exchange, Inc., Parker and others was entered by the trial court for four million sixty eight thousand five hundred and one dollars ($4,068,501.00) a large portion of which were punitive damages and attorney fees, it being the first court to obtain jurisdiction over the parties and subject matter.

Eighteen months after the Petitioners commenced their litigation against Defendants in the consolidated cases 80 K 850 and 80 K 859, a complaint was filed on

December 23, 1981 in the United States District Court of New Jersey, Civil Action No. 81-3990, on behalf of New Jersey Plaintiffs who were also investors in the fraudulent tax shelter program.

On February 9, 1982, Defendants Parker and International Mining Exchange, Inc. in Criminal Action No. 81-CR-122 pleaded guilty to mail fraud and other crimes arising from this scheme before the U.S. District Court in the criminal proceedings that were correlative to the civil actions. Almost immediately after this hearing, counsel for the Petitioners requested permission to attend a proceeding in chambers between the attorneys for the government and the Defendants, which the criminal court denied even though the U.S. Attorneys' office said they had no objection. This proceeding was unreported but focused on two issues: one dealing with the possible disposition of the criminal matter, and the other with a request for a stay of other litigation.

On the same day, February 9, 1982, Defendants Parker and International Mining Exchange, Inc. transferred approximately six million dollars ($6,000,000.00) to their defense counsel and an Assistant U.S. Attorney. Also on February 9, a written motion seeking the appointment of a receiver was filed by the United States Attorneys' office, and orders authorizing a receivership and the appointment of a receiver were signed by the court.

On April 16, 1982 the U.S. District Court in New Jersey entered judgment of eight million dollars ($8,100,000.00) in Civil Action No. 81-3990 and additionally granted class certification sought by the New Jersey Plaintiffs. This action was taken after the Petitioners in the consolidated action numbers 80 K 850 and 80 K 859 had already obtained final judgment. Three days

later, the New Jersey Plaintiffs registered their judgment in the district of Colorado, Civil Action No. 82 J 17, which was assigned to the same judge sitting in consolidated action numbers 80 K 850 and 80 K 859.

After the docketing of the New Jersey judgment in Colorado the Petitioners on April 22, 1983 in the consolidated cases, 80 K 850 and 80 K 859 served Writs of Garnishment and Interrogatories on the Receiver and Trustees holding the assets of Defendants Parker and/or International Mining Exchange, Inc. It was the Petitioners' position in the consolidated civil cases the Criminal Court in Action No. 81-CR-122 did not have jurisdiction to create the receivership, thereby permitting its assets to be attached.

On June 2, 1982, the Petitioners in the consolidated actions filed a Motion to Compel the alleged Receiver to respond to the Interrogatories pursuant to their Writs of Garnishment which sought the location of the assets of Defendants International Mining Exchange, Inc. and Parker. The Receiver unsuccessfully resisted Petitioners' Motion to Compel before the Judge sitting in the civil action. On June 25, 1982 Writs of Garnishment were served on the banks in the possession of the assets of Trenton H. Parker and the International Mining Exchange, Inc.

Immediately thereafter the New Jersey Plaintiffs also filed Writs of Garnishment on their judgment docketed with the United States District Court of Colorado, 82 J 17. It was also the position of the New Jersey Plaintiffs that the criminal court lacked jurisdiction to create a receivership. In addition, they maintained the funds should be transferred to the District Court in New Jersey because they alleged it was the first court to acquire jurisdiction over the assets of Defendants Parker and the

International Mining Exchange, Inc. Subsequently the United States District Court in New Jersey established a second receivership funded by additional assets of approximately five hundred thousand dollars ($500,000.00) of Defendants International Mining Exchange, Inc. and Parker.

Counsel for the receiver sought to dismiss the Petitioners' garnishment and deny the request to transfer the funds from Colorado to the United States District Court in New Jersey. The trial judge in his Order of July 26, 1982, Appendix A, stated the court could find no authority nor had any been cited by any party permitting criminal courts to establish a receivership. The court further found in its decision that in order to rule favorably on the garnishments and the transfer of funds it would have to rule on the validity of the Judge's decision creating the receivership which it refused to do because it ruled the criminal court orders were not subject to its review.

The trial court concluded the issues concerning the creation of the receivership and the validity of the garnishments involved controlling questions of law as to which there is substantial grounds for difference of opinion and made the necessary findings to certify these issues to the United States Court of Appeals pursuant to 28 U.S.C. 1292 (b). The trial court in its ruling of July 26, 1982, Appendix A, denied the motion of the New Jersey Plaintiffs to tranfer the funds to the United States District Court for the District of New Jersey and dismissed the Petitioners' Writs of Garnishment. The court by its own order on July 27, 1982 stayed its decision of July 26, 1982 pending review.

On August 23, 1982 the United States Court of Appeals granted Petitioners' Appeal pursuant to 28 U.S.C. 1292 (b) and in addition granted a stay pending review.

On January 31, 1983 the United States Court of Appeals in its decision, Appendix B, concluded the Colorado receivership was valid and not subject to garnishment. The Court further denied the motion to transfer the funds of the Colorado receivership to the civil receivership sought by the New Jersey Plaintiffs.

Petitioners filed a timely application for rehearing and suggestions for rehearing en banc which the Appellate Court denied in its order of March 7, 1983, Appendix C. Petitioners thereafter sought a stay for mandate which was granted on March 28, 1983. The Appellate Court stayed mandate until April 27, 1983 pending Petitioners' filing certiorari with the stay to continue until final disposition of this matter by the Court.

REASON FOR GRANTING THE WRIT

I.

The ruling of the Tenth Circuit Court of Appeals has for the first time extended the jurisdictional reach of the criminal court to establish receivership by its interpretation of 18 U.S.C. 3651 and Rule 57(b) of the Federal Rules of Criminal Procedure.

The significance of the legal issues raised by permitting criminal courts to establish receiverships was acknowledged by the trial court when it voluntarily certified this matter in its own order to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1292 (b). The Appellate Court's realization concerning the importance of this question and its impact on the orderly administration of justice and jurisdiction was manifested when pursuant to its own order it expedited the appeal and granted a stay both before and after its decision.

This unprecedented ruling by the Appellate Court in permitting criminal courts to establish receiverships is a matter of first impression that could procedurally as well as substantively jolt the judicial and legislative process. Even in a civil context a motion in Federal Court for the appointment of a receiver should be granted only under the most extreme circumstances. See *Tcherepnin* v. *Franz*, D.C.Ill. 1966, 277 F. Supp. 472. Furthermore, a party seeking the appointment of a receiver has a heavy burden. See *Wickes* v. *Belgian Am. Educational Foundation, Inc.*, D.C.N.Y. 1967, 266 F. Supp. 38.

Concerning the initial invocation of jurisdiction Moore's Federal Practice, Vol. 1, p. 621 states:

> "Jurisdiction of the United States District Court is limited to that which Congress has granted them by valid statute. One who invokes this jurisdiction for the first time must clearly show his actions within the Court's jurisdiction."

The Appellate Court in its Opinion, Appendix B, held:

> "Rule 57(b) of the Federal Rules of Criminal Procedure gives courts latitude in fashioning special procedures. This section reads:
>
> 'If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.'
>
> There is no convincing claim that any rule or statute makes the order in question 'unlawful' nor that it is necessarily inconsistent with statutory law. Instead the parties in the civil action urge that there is an absence of express authority and thus of jurisdiction to create the receivership.
>
> The appellants urge that the legislative history as well as some judicial interpretation of Rule 57(b)

> suggests that it was directed to alleviate possible conflicts between state and federal procedures, and that it cannot be used to justify such an unusual practice as is here in question. 8B Moore's Federal Practice § 57.03 at 57-4 (2d ed. 1965). However, legal and practical consideration militate against such a narrow interpretation." (pp. 7-8)

The Appellate Court in its analysis of 57(b) now furnishes authority to permit this rule to be used as a safety net to justify a deviation from established procedure. This radical departure by a criminal court from existing practice was addressed in Volume 8B of Moore's Federal Practice § 57.03 at 57-4 (2d ed. 1965):

> Subdivision (b) was intended to eliminate any requirements of conformity to State procedure. This does not mean that the trial judge is foreclosed from applying a State rule in a particular situation provided there is no inconsistency with the Federal Rules. An example of Subdivision (b) is the matter of sequestration of a witness at a trial. Subdivision (b) is not a *catch-all* which justifies departure from existing policy and practice on matters of substance by an individual judge." (Emphasis supplied).

The Court of Appeals in its decision gave little if any weight to Moore's analysis of 57(b) nor the legislative history as well as the judicial interpretation pressed upon them in the Petitioners' brief below. The Court however, cited no authority to justify "such an unusual practice," (pp. 7-8), except a conclusory statement:

> "However, legal and practical considerations militate against such a narrow interpretation." (pp. 7-8).

If criminal courts were intended to have jurisdiction to create receiverships then its Rules of Practice and Procedure would have contained a rule similar to Rule 66 of the Federal Rules of Civil Procedure.

The second basis the Appellate Court used in support of its position permitting the court to establish receivership is 18 U.S.C. § 3651 relating to probation and suspension of sentences. Again in its opinion the court cites no express authority under this statute to appoint a receiver but concludes:

> "(it) . . . is both necessary and beneficial to accomplish restitution. (p. 10).

In the case at bar there was no reason to extend the reach of 18 U.S.C. § 3651 because there was already a "pendente lite" in a parallel civil suit pending in the same courthouse involving substantially the same subject matter and parties. A receivership could have been established in this litigation pursuant to Rule 66 of the Federal Rules of Civil Procedure, after the plea of the Defendants.

In its Opinion the Court attempts to buttress its interpretation of 18 U.S.C. § 3651 by citing Public Law 97-291, 18 U.S.C. § 3759, § 5(a)(4)(d) which provides in part:

> "The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process."

The rationale behind this Statute is to permit the criminal courts to impose an order of restitution with the caveat that such order will not unduly complicate or prolong the sentencing process.

The practical effect of permitting a criminal court to appoint a receiver to accomplish restitution would be contrary to the intent of the statute because it would unnecessarily complicate and prolong the sentencing process until the termination of the receivership.

The establishment of receiverships by criminal courts would also mandate they function as civil tribunals to adjudicate the merits of various creditors. The criminal court during a hearing on February 3, 1983 concerning the receivership vividly described the complexities and ramifications of these types of proceedings, which was brought to the Appellate Court's attention as part of a Petition for Rehearing:

> "THE COURT: No. No. He will know some of them, but wait until you run your ads telling him there is a hearing. Don't forget that lots of people can claim an interest in this thing since the last time Mr. Lamb (sic) heard from them. We may have some bankruptcy problem; we may have some trustees in bankruptcy moving in there and claiming entitlement. I can see where this hearing may present some disputes that will take 20 minutes, and I can see where we may have hearings that will take 20 weeks, and I don't want to—I want to get the show on the road."

The Appellate Court stated in its ruling of January 31, 1983:

> "Again we must hold that the trial, the plea bargain, the return of the funds to the United States, the receiverships and the probation have all been interdependent elements of the Colorado criminal proceedings. It is one package for all practical purposes, and should be there concluded as such as quickly and efficiently as possible." (pp. 13-14)

If these various elements are all "interdependent" with the criminal proceedings and if the Defendants' Motions for a new trial, which have already been filed, are successful, or if the Court permits the Defendants to recant their plea agreements, then the collapse of the receivership would inevitably follow, further compounding the complexities and length of these type of proceedings.

Public Law 97-291 in section (d) reads:

> "Such order will not unduly complicate or prolong the sentencing process."

In Senate Report No. 97-532 concerning the legislative history of Public Law 97-291 set forth in Volume 9, November 1982, U.S. Code Congressional & Administrative News, p. 2539, provides insight into the intent of Congress concerning this section:

> "Section (d) specifically provides that restitution may not be ordered in cases arising under the antitrust laws, the securities laws, or certain other regulatory statutes. These statutes involve complex issues which are outside the intended scope of Section 3579 such as standing, reliance, and causation. Moreover, these statutes have historically contained their own methods of restitution for victims—such as the authorization of treble damages—a system of sanctions and reparations the Committee believes should remain integral parts of the regulatory statutes themselves."

The U.S. District Court of New Jersey in its questioning of Mr. Rafferty, the Colorado Assistant U.S. Attorney who was co-prosecutor in 81-CR-122, concerning the creation of the receivership by the criminal court, obtained the following responses on June 11, 1982 in a transcript contained in the record of these proceedings:

> "MR. RAFFERTY: Your Honor, two things. I think Judge Winner and yourself are of the same opinion, because at the sentencing Judge Winner ordered the Receiver not to reveal where they put the monies for all of the investors for this purpose. To avoid those two large judgment creditors in Colorado from doing any type of garnishment.
>
> THE COURT: I am—I am breathless. You tell me that a Court-appointed Receiver has been ordered by the Judge to conceal the locus of the funds?

> MR. RAFFERTY: To prevent garnishment by the two judgment creditors."[1]

Bispham's Principles of Equity, (10th Ed.) Chap. 9, p. 868, states:

> "Receivers are not appointed by a court of equity simply on the grounds of public convenience or because there are no means of collecting or taking care of a fund."

If a receivership can be used as part of the sentencing process to eradicate rights of investors under such statutes as the Bankruptcy Act or hollow out judgments obtained under the Federal Securities Law then no sane investor would ever seek redress in the Courts. This Court in its recent decision in *Herman* v. *MacLean* v. *Huddleston, et al.*, United States Supreme Court No. 81-680, January 24, 1983 crystalized the language in its previous pronouncements, see *Cf. Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), by stressing that the legislative intent behind the Federal Securities Law was to provide investors with more extensive redress than those remedies available at Common Law.

It is uncontradicted the efforts of Petitioners "after a lengthy discovery process," (p. 4 of Appendix A), developed evidence that was significant in the Securities and Exchange Commission proceedings as well as the criminal case against the Defendants. The public policing of security fraud through civil litigation which the Security Act encourages, will be substantially diminished if the

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[1] On July 7, 1982, Judge Winner, in the opening statement on a hearing concerning the receivership, stated the U.S. Attorneys' Office was mistaken in that his Court had never tried to conceal the locus of the funds of Defendants International Mining Exchange, Inc. and Parker.

Appellate Court's ruling is left undisturbed. What motivation would investors have to pursue their remedies to judgment if their rights as creditors are rendered meaningless by judicial action, creating a receivership that accords judgment creditors the same, or even lower priority, as investors who were content in attempting to take a five to one tax write-off.

The appointment of a receiver, even where it was expressly authorized is such an extraordinary remedy with such a devastating effect that Congress permitted this decision to be judicially reviewed pursuant to an interlocutory appeal as a matter of right in accordance with 28 U.S.C. § 1292 (a)(2).

II.

The Fifth Amendment to the United States Constitution embraces the concept of equal protection within the due process clause, see *U.S.* v. *Pipefitters Local Union No. 562*, C.A.Mo. 1970, 434 F.2d 1116, adhered to 434 F.2d 1127, certiorari granted 91 S.Ct. 2168, 402 U.S. 994, 29 L.Ed.2d 160.

The Bankruptcy Act in Section 362(b)(1) exempts from an automatic stay criminal proceedings under this Statute:

> "(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor; . . ."

The Court of Appeals stated in its Opinion:

> "Again we must hold, the trial, the plea bargain, the return of funds to the United States, the receiverships and the probation have all been interdependent elements of the Colorado criminal proceedings." (pp. 13-14)

As a result of the Appellate Court's decision, if a receivership is set up to provide restitution and it is an interdependent element in the criminal proceedings then it usurps the rights of judgment creditors under the Bankruptcy Statutes. The exemption under the automatic stay provision of the Bankruptcy Act was clearly intended to prohibit a criminal from avoiding prosecution through the use of the stay provision. If a receivership under the Appellate Court's decision is now set up as a mechanism for restitution by a criminal court it extinguishes a creditor's rights under the Bankruptcy Act to obtain an immediate stay which could be the essence of his entire remedy. This was clearly never contemplated by Congress. The creation of the receivership by a criminal court has a greater impact on substance and procedure in both civil and criminal cases than appears at first blush.

III.

This Court's vintage opinion in *Hamock* v. *Loan and Trust Co.*, [105 U.S. 77, 26 L.Ed. 11 (1881)] has stood for over a hundred years for the proposition that assets of a jurisdictionally defective receivership could be siezed by process emanating from another court. Even though the Hamock case was raised before the Appellate Court it was never mentioned in their decision. The *Hamock* case involved a civil receivership that was jurisdictionally defective based on this Court's interpretation of a state statute. In the case at issue there clearly is no expressed authority in 18 U.S.C. § 3651 or Rule 57(b) or anywhere else to permit the Appellate Court to substantially diminish the lines historically drawn between criminal and civil courts.

Even where the appointment of a receiver was expressly authorized by statute in a civil suit, because of the extraordinary remedy involved, judicial scrutiny was

mandated by this court when it spoke in *Kelleam* v. *Maryland Casualty Co.*, 312 U.S. 377, 380, 61 S.Ct. 595, 85 L.Ed. 899:

> "Accordingly, a receiver should not have been appointed. The error in the appointment was not a question of authority but or propriety. *Pennsylvania* v. *Williams*, 294 U.S. 176; *Gordon* v. *Washington*, 295 U.S. 30. As this Court stated in the *Gordon* case (p. 37): 'A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself.' Receiverships for conservation of property 'are to be watched with jealous eyes lest their function be perverted.' *Michigan* v. *Michigan Trust Co.*, 286 U.S. 334, 345. This Court has frequently admonished that a federal court of equity should not appoint a receiver where the appointment is not a remedy auxiliary to some primary relief which is sought and which equity may appropriately grant. *Booth* v. *Clark*, 17 How. 322, 331; *Pusey & Jones Co.* v. *Hanssen*, 261 U.S. 491; *Gordon* v. *Washington*, *supra*. And the reasons for such restraint are reinforced where the rights to the property sought to be conserved by a receivership are being litigated in a state court. Cf. *Penn General Casualty Co.* v. *Pennsylvania*, 294 U.S. 189; *Pennsylvania* v. *Williams*, *supra*."

If a court had no jurisdiction to create a receivership then its order appointing a receiver was constitutionally unlawful and the assets held by the Receiver are subject to a lawful process emanating from a second court, *see Hamock*, *supra*.

CONCLUSION

The expedited procedure route this Appeal has taken as a result of the lower court's own order and the granting of stays by both the district and appellate courts, which

are even now in effect, manifests the significant impact the court's ruling will have on the judicial system both procedurally and substantively. The trial judge was fully cognizant of the grave and wide-spread ramifications a ruling on these issues would have when the court in the preamble to its decision, Appendix A, stated:

> "This melange of litigation began in 1980 with my granting summary judgment for the plaintiff in *S.E.C.* v. *International Mining Exchange, et al.*, 515 F.Supp. 1062 (D. Colo. 1981). Because the three captioned cases, as well as others, were related, they too, were assigned to me in keeping with our Local Rules of Practice. Such serious questions regarding the orderly administration of justice and jurisdiction exist that I will make findings which will permit an immediate appeal from this order in accordance with 28 U.S.C. § 1292 (b). Arguably, these same findings may make the appeal a matter of right in accordance with 28 U.S.C. § 1292(a)(2)."

Respectfully, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

CASE NO. 80-K-850

ROBERT C. HERZFELD, *[Plaintiff]*,

v.

ROBERT C. HERZFELD, ADRIAN DOYLE, JAMES T. WILSON, STEPHEN SPANGLER, ROBERT E. NORWOOD, and INTERNATIONAL MINING EXCHANGE, a Colorodo corporation, *[Defendants]*.

CASE NO. 80-K-859

ROBERT F. BROWN, ROBERT A. BRANDT, and RFB PETROLEUM, INC., a Texas corporation, *[Plaintiffs]*,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., a Colorado corporation, R. STEVEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE, and ROBERT NORWOOD, *[Defendants]*.

CASE NO. 82-J-17

ELIZABETH EKEN, et al., *[Plaintiffs]*,

v.

INTERNATIONAL MINING EXCHANGE, INC., et al., *[Defendants]*.

KANE, J.

MEMORANDUM OPINION AND ORDER

This melange of litigation began in 1980 with my granting summary judgment for the plaintiff in *S.E.C.* v. *International Mining Exchange, et al.*, 515 F.Supp. 1062 (D. Colo. 1981). Because the three captioned cases, as well as others, were

related, they too, were assigned to me in keeping with our Local Rules of Practice. Such serious questions regarding the orderly administration of justice and jurisdiction exist that I will make findings which will permit an immediate appeal from this order in accordance with 28 U.S.C. § 1292(b). Arguably, these same findings may make the appeal a matter of right in accordance with 28 U.S.C. § 1292(a)(2).

Cases 80-K-850 and 80-K-859 were consolidated in September, 1980. They are civil securities fraud actions against Trenton H. Parker, International Mining Exchange and others based on fradulent tax shelter investment schemes. On September 8, 1981, I entered judgment for the plaintiffs against the defendants, Parker and International Mining Exchange, for $4,058,501. On February 9, 1982, the defendants Parker and International Mining Exchange in criminal action 81-CR-122 in this district before Judge Winner pleaded guilty to charges arising from the fradulent schemes. Pursuant to a plea arrangement Parker agreed to turn over the proceeds of the fraudulent scheme to the custody of a court-appointed receiver.

On February 9, 1982, Judge Winner appointed William C. Lam as the receiver and Assistant United States Attorney Robert McAllister and the defendant's counsel, Dan Smith, as Trustees. Judge Winner's order provides that upon receipt of Parker's funds and certificates, the receiver shall invest the funds in treasury bills, certificates of deposit, or other legal instruments pending restitution to the defrauded investors.

On April 16, 1982 Judge Herbert J. Stern of the District of New Jersey entered judgment against the defendants Parker and International Mining Exchange for $8,100,000 in a class action based on the same fraudulent scheme. Three days later, those plaintiffs filed a certification of their judgment for registration in the District of Colorado. This action, 82-J-17, was also assigned to me.

On April 22, 1982 the plaintiffs in the consolidated Colorado civil cases, 80-K-850 and 80-K-859, served writs of garnish-

ment with interrogatories on the receiver and the trustees. On July 12, 1982 the New Jersey plaintiffs also filed writs of garnishment. The parties have filed briefs in support of and in opposition to the registration of the New Jersey judgment in Colorado. In addition there has been substantial briefing on several motions including a motion to consolidate the civil actions and transfer the funds to New Jersey, a motion to dismiss or quash the Colorado plaintiffs writs of garnishment, a motion for replevin and a motion to certify the motion to dismiss the writs of garnishment to Judge Winner in the criminal case, 81-CR-122. At the last hearing on this matter, I denied the motion to certify the motion to dismiss the writs of garnishment to Judge Winner and the New Jersey plaintiffs withdrew their motion for replevin. Accordingly, this matter is now before me on the motion to consolidate the cases and transfer the funds to the United States District Court for the District of New Jersey, and the motion to dismiss or quash the writs of garnishment.

It is conceded by all parties that permission has neither been sought from Judge Winner nor given by him to institute garnishment proceedings against the receiver, Mr. Lam, who was appointed by him in the criminal case, 81-CR-122. *See Bankers'* v. *Mortgage Co. of Topeka, Kan.* v. *McComb*, 60 F.2d 218 (10th Cir. 1932). The plaintiffs in the consolidated actions, 80-K-850 and 80-K-859, argue that there is no inherent power which permits United States District Courts to appoint a receiver in criminal proceedings. No authority has been cited by any party and I can find none which addresses this question. *United States* v. *Roberts*, 619 F.2d 1 (7th Cir. 1979) is suggested, but it is inapposite since the receiver was not appointed by the judge in the criminal case.

The plaintiffs in the New Jersey class action likewise assert that Judge Winner was without jurisdiction in the criminal case to appoint a receiver and they therefore seek to have the funds in the possession of the receiver transferred to the court in New Jersey and there to establish a receivership. Predictably the plaintiffs in the consoldated actions assert that their

garnishment is first in time and that a subsequently established receivership will not defeat it. The class action plaintiffs rejoin by asserting that Judge Stern in the class action was the first to acquire jurisdiction over the funds in question and thus the garnishment in the consolidated actions is subservient. Further, the class action plaintiffs assert that fundamental justice would be thwarted by allowing the consolidated action plaintiffs to satisfy their judgment which is heavily loaded with punitive damages because that satisfaction would deprive the members of their plaintiff class of any recovery. I am therefore asked by them to deny the consolidated action plaintiffs' garnishment and order the funds transferred to the United States District Court for the District of New Jersey.

The arguments presented share a penultimate element: in order to rule favorably on any of the motions I would be required to determine that the order of Judge Winner establishing the receivership and appointing Mr. Lam as receiver is void for want of jurisdiction. This I cannot and will not do. The law on this point in the Tenth Circuit is stronger than in most jurisdictions.[1] In *Humphrey* v. *Bankers Mortg. Co. of Topeka, Kan.*, 79 F.2d 345, 352 (10th Cir. 1935) the Court of Appeals said:

> . . . It is well settled that in such circumstances the deliberate judicial acts of one judge are not open to review by another judge of the same court having co-ordinate jurisdiction. That is a salutary rule of comity which rests upon sound considerations of necessity. Any other would strike down orderly procedure and substitute unseemly conflict in its stead. The respective orders approving the petition and appointing a trustee in the involuntary proceeding could be reviewed only by appeal to this court.

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[1] There are numerous cases dealing with the problems inherent in one judge overruling another judge in the same case, but there are few cases reported involving a judge attempting to overrule another judge in a different case which deals with the same property. *See Annot. Propriety of Federal District Judge's Overruling or Reconsidering Decision or Order Previously Made In Same Case By Another District Judge*, 20 A.L.R. Fed. 13.

> They were not open to review by the other judge of that court in the voluntary proceeding.

From the foregoing it is obvious that Judge Winner's orders are not subject to my review. Therefore, I deny the motion to consolidate the cases and transfer the funds to New Jersey and I grant the motions to dismiss or quash the writs of garnishment.

Another point needs to be made in order to explain my use of 28 U.S.C. § 1292. The plaintiffs in the three captioned cases are not parties to the criminal action and intervention there is not possible. *Bankers' Mortg. Co. of Topeka, Kan.* v. *McComb, supra*, at 222.[2] The only practicable way for the numerous parties litigant to obtain judicial resolution of these issues is for me to find that which this voluminous record fully justifies. Therefore, I find that this order involves a controlling question of opinion and that an immediate appeal from this order will materially advance the ultimate termination of this litigation.

IT IS ORDERED that the motion of the class action plaintiffs in 82-J-17 to consolidate and transfer funds to the United States District Court for the District of New Jersey is denied,

IT IS FURTHER ORDERED that the motions to quash or dismiss the writs of garnishment are granted, and

IT IS FURTHER ORDERED that this memorandum opinion and order shall constitute my statement in writing required by 28 U.S.C. § 1292(b) so that the Court of Appeals may decide, in its discretion, whether to permit an appeal from this order.

DATED at Denver, Colorado this 26th day of July, 1982.

/s/ JOHN L. KANE, JR.
John L. Kane, Jr.
United States District Judge

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[2] Another approach is mentioned in *T.C.F. Film Corp.* v. *Gourley*, 240 F.2d 711, 714 (3d Cir. 1957), but its use in this circuit is unknown.

APPENDIX B

JANUARY TERM—January 31, 1983

Before Honorable Oliver Seth, Honorable James E. Barrett, and Honorable William C. Doyle, Circuit Judges

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No. 82-1948

ROBERT C. HERZFELD,

Petitioner,

v.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO and THE HONORABLE FRED M. WINNER,

Respondents.

This matter comes on for consideration of petitioner's petition for writ of prohibition filed in the captioned cause.

Upon consideration whereof, the petition for writ of prohibition is denied.

/s/ Howard K. Phillips, Clerk
HOWARD K. PHILLIPS, Clerk

United States Court of Appeals
For the Tenth Circuit

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1948

ROBERT C. HERZFELD,

Petitioner,

v.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO and THE HONORABLE FRED M. WINNER,

Respondents.

No. 82-1994
(D.C. Crim. No. 81-CR-122)

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRENTON H. PARKER, INTERNATIONAL MINING EXCHANGE, INC.,

Defendants,

ELIZABETH EKEN, as representative of the class of investors defrauded by Trenton H. Parker and International Mining Exchange, Inc.,

Appellant,

WILLIAM C. LAM,

Receiver-Appellee.

No. 82-2044
(D.C. Civ. No. 80-K-850)

ROBERT C. HERZFELD,
Plaintiff-Appellant,

v.

TRENTON H. PARKER, ADRIAN DOYLE, JAMES T. WILSON, STEPHEN SPANGLER, ROBERT E. NORWOOD and INTERNATIONAL MINING EXCHANGE, a Colorado corporation.
Defendants-Appellees.

No. 82-2045
(D.C. Civ. No. 80-K-859)

ROBERT F. BROWN, ROBERT A. BRANDT and RFB PETROLEUM, INC., a Texas corporation.
Plaintiffs-Appellants,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., a Colorado corporation, R. STEVEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE and ROBERT NORWOOD,
Defendants-Appellees.

No. 82-2046
(D.C. Civ. No. 82-J-17)

ELIZABETH EKEN and WILLIAM JOHNSON,
Plaintiffs-Appellants,

v.

INTERNATIONAL MINING EXCHANGE, INC., et al.,
Defendants-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Patrick C. English of Dines, English & O'Kane, Clifton, New Jersey (Walter L. Gerash of Gerash & Robinson, P.C., Denver, Colorado, with him on the brief), for Appellant Elizabeth Eken.

Richard B. Podoll of Podoll and Podoll, P.C., Denver, Colorado, for Appellant Robert C. Herzfeld.

William A. Wilson of William Andrew Wilson, P.C., Denver, Colorado, for Appellants Robert F. Brown and RFB Petroleum, Inc.

Richard N. Stuckey of Keene, Munsinger & Stuckey, Denver, Colorado, for Appellee William C. Lam.

Robert T. McAllister, Assistant United States Attorney (Robert N. Miller, United States Attorney, and Gerald J. Rafferty, Assistant United States Attorney, with him on the brief), Denver, Colorado, for Appellee United States of America.

Before SETH, Chief Judge, BARRETT and DOYLE, Circuit Judges.

SETH, Chief Judge.

FILED
United States Court of Appeals
Tenth Circuit
JAN 31 1983
HOWARD K. PHILLIPS
Clerk

In this case we consider consolidated appeals all of which arise from a somewhat involved set of facts. We set out only the facts necessary to explain our disposition of the matter.

Trenton H. Parker was indicted in Colorado for mail fraud in connection with an investment plan. During his trial he pled guilty in the United States District Court for Colorado under a plea agreement pursuant to which he transferred to that court in Colorado approximately six million dollars which had been on deposit in a bank in the Bahamas. This money was part of the proceeds of the "Gold Tax Shelter Investment Program" which was the particular scheme which gave rise to the criminal charges. Pursuant to the plea agreement and the sentencing, the United States District Judge in Colorado ordered that the money be used for restitution to those investors defrauded by the Gold Tax Scheme. The judge further ordered that the restitution be effected through a receivership and appointed a receiver. This appontment of a receiver during the course of the criminal proceedings and with no pending civil action is contested in each of the instant appeals.

Prior to the criminal proceedings several private investors, among them appellant Herzfeld, filed suits in the United States District Court for Colorado to recover monies lost in some of Mr. Parker's investment plans. After a lengthy discovery process, summary judgment for these plaintiffs was therein granted for about four million dollars. By far the greatest part of that figure represented attorneys' fees and punitive damages. Shortly thereafter (December 23, 1981) a class action was brought in New Jersey on behalf of investors defrauded in the "Gold Tax Shelter Investment Program." The United States District Judge certified the class on January 29, 1982 and issued a restraining order against Barclay's Bank in the Bahamas and others. There were deposits of Mr. Parker in the bank which were proceeds of the Gold Tax scheme.

The Grand Cayman bank had entered no appearance in the class action pending in New Jersey. The government argues that any conformance by the bank to the restraining order

would have been a purely voluntary matter. Thus it points to an affidavit by an Assistant United States Attorney which recites that the bank manager and its counsel advised him, apparently after the fact, that the bank would not honor a restraining order and would instead have transferred the funds on the request of Mr. Parker. Also, the only action taken by the bank was taken after the depositor, Mr. Parker, requested that the funds be transferred to Colorado pursuant to the plea agreement and the funds were so immediately transferred.

We do not decide whether the Grand Cayman bank was or was not bound by the orders of the New Jersey court. The court modified its order about the same time to permit the transfer of funds and the transfer was made in any event. Mr. Parker entered his plea on February 9, 1982 and he directed the bank to make the transfer. As mentioned, the funds were so transferred by the Grand Cayman bank to Colorado, and then into the registry of the court and to the receiver. The receiver was later directed by the instructions of the court given at the sentencing of Trenton Parker. The receiver invested the funds pending their distribution and set about to identify the defrauded investors.

Before any disbursement, the claims here considered were asserted against the funds. The plaintiffs in the Colorado civil actions attempted garnishment of the money in the receivership as did the class action plaintiffs. These parties argued that the receivership was void and that the funds were subject to garnishment. The class certified in New Jersey also moved to have the money transferred into a receivership there. In support of this motion the class also argued that the Colorado receivership was void.

The claims by the parties in the civil suits came before a judge other than the one before whom the criminal action had been heard and he ruled that the civil plaintiffs could not prevail unless the receivership established in the criminal case was found to be void. He refused to invalidate the receivership,

he quashed the writs of garnishment, and denied the motion to transfer the funds to New Jersey. The judge recognized that the validity of the appointment of a receiver in a criminal case was the controlling question of law in the disposition of the claims of the civil plaintiffs, and was a matter about which there could be substantial difference of opinion. He formally made these findings for review under 28 U.S.C. § 1292.

In addition to this, the Colorado plaintiffs have petitioned this court for a writ of prohibition directed against the receivership. Finally, there was an appeal pending from the denial of a motion filed by the New Jersey class plaintiffs in the Colorado criminal case requesting the transfer of the funds to New Jersey. These cases are consolidated to consider the question whether the receivership established in the criminal case is valid.

The district court's power to provide for restitution is created by the statutes relating to probation and suspension of sentences. Thus 18 U.S.C. § 3651 provides in part that:

> "While on probation and among the conditions thereof, the defendant—
>
> . . . .
>
> "May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and. . . ."

The statute does not delineate what, if any, special powers are granted to the sentencing court to create means by which restitution might be accomplished. This restitution is part of the criminal and sentencing procedure under the statute.

Rule 57(b) of the Federal Rules of Criminal Procedure gives courts latitude in fashioning special procedures. This section reads:

> "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

There is no convincing claim that any rule or statute makes the order in question "unlawful" nor that it is necessarily inconsistent with statutory law. Instead the parties in the civil actions urge that there is an absence of express authority and thus of jurisdiction to create the receivership.

The appellants urge that the legislative history as well as some judicial interpretation of Rule 57(b) suggests that it was directed to alleviate possible conflicts between state and federal procedures, and that it cannot be used to justify such an unusual practice as is here in question. 8B Moore's Federal Practice ¶ 57.03 at 57-4 (2d ed. 1965). However, legal and practical considerations militate against such a narrow interpretation.

Congress' enactment of the provision providing for restitution must contemplate sufficient flexibility and authority in criminal proceedings to accomplish restitution in a great variety of circumstances. In Blue Cross Ass'n v. Harris, 662 F.2d 972, at 978, the Eighth Circuit observed:

> "It is a commonplace of statutory construction that a legislative grant of a power carries with it the right to use the means and instrumentalities necessary to the beneficial exercise of that power."

See also Daly v. Stratton, 326 F.2d 340 (7th Cir.). Thus, insofar as a receivership was necessary to accomplish restitution in these circumstances the authority to create the receivership should be considered as implicit in the power to order restitution.

As to changes taking place *after* defendant's trial, it is significant that by Public Law 97-291 restitution may now be ordered whether or not the defendant is placed on probation, and it has become a much more important part of sentencing. Reasons must now be expressed by the sentencing court if it does not order restitution in full. For purposes of this appeal it is important that these changes provide for much broader and flexible orders for restitution and new ways to enforce such orders entered in the criminal proceedings. But again there is

no machinery provided or required to accomplish the restitution itself. This matter is still left to the discretion of the sentencing court, and in our view this includes the receivership here in issue.

The considerations involving practical concerns have also been recognized. Courts are making increasing use of special probation orders suitable for particular cases. We have approved such devices. United States v. Lawson, 670 F.2d 923 (10th Cir.). The use of special provisions demonstrates the need for flexibility in orders which attempt to make effective use of the authority to fashion useful probation. The Ninth Circuit in United States v. Pierce, 561 F.2d 735, stated that the "practical needs of the probation system" are a consideration in determining the validity of special conditions on probation. *See also* United States v. Consuelo-Gonzales, 521 F.2d 259 (9th Cir.). Thus even if the receivership cannot be said to be a necessity but a practical and effective device to assist in effecting the goals of the criminal system, it should be approved.

In a scheme like this one, where substantial sums of money are involved, the appointment of a receiver to invest and distribute the money is both necessary and beneficial to accomplish restitution. The functions to be performed are typically those of a receiver—only the setting is unusual.

The parties have cited three cases in the United States Courts of Appeal which involved receivership in the context of a criminal case. These are United States v. Roberts, 619 F.2d 1 (7th Cir.); United States v. Boswell, 605 F.2d 171 (5th Cir.); Patterson v. Stovall, 528 F.2d 108 (7th Cir.). In all of these cases, however, the receiverships were initially established through civil actions.

The usual practice of directing a probation officer to accomplish restitution is desirable where there are few claimants and where the amount of money is not great. However, where as here the interim investment of the money is necessary, where the identification of the persons entitled to restitution may be difficult, where the number of claimants is large and a pro rata

distribution of a large fund is necessary, a person with more specialized training is required. The expertise of the probation officers is in other fields.

The Colorado receiver is under control and direction of the court appointing him as are the receivership proceedings to accomplish restitution. There is no suggestion that there may be a delegation of authority to private litigants nor is restitution part of litigation among private parties. Thus there would seem to be a serious question whether the district court in Colorado could delegate restitution to be accomplished in such proceedings nor even by another receiver appointed in connection therewith.

A criminal proceeding in a United States district court is not in a separate compartment with the court exercising only a limited portion of its authority as the appellants argue. The federal courts obviously are of limited jurisdiction but the extent of the authority of the district courts in these circumstances is not limited or governed by whether the proceeding is criminal or civil. We find nothing in the decisions nor in statutory law which prevents the creation of the receivership in the criminal action here under consideration.

There is an important additional factor in the case which also leads to the conclusion we reach. This is the fact that the return of the money to the United States and restitution to the investors was part of the plea agreement between the United States and the defendant. It was reached during the course of defendant's trial. The defendant performed his part of the agreement in instructing the Grand Cayman bank to remit the funds to the United States. This was the only effective action to bring the funds into the registry of the court to permit restitution. It remains for this restitution to proceed to conclusion, for the plea agreement to be executed on the Government's side, and for the condition of probation to be met.

Thus the plea agreement, the return of the funds to the United States, the sentencing and the restitution are all interrelated parts of the proceedings in Colorado which started

with the indictment of the defendant in June of 1981. The restitution is the unexecuted part of this bundle and remains part of the sentencing. It is important that the Colorado proceedings thus continue on the track they are now on, and that nothing be done to jeopardize the restitution underway pursuant to the agreed transfer of funds and the plea agreement generally.

The New Jersey judge, Judge Stern, in his modification of the injunction indicated that the important thing was to have the transfer of funds accomplished. The fact that the funds would become locked into the Colorado proceedings may not then have been contemplated, but in any event, they became available to the investors which was the end sought in the class action. Judge Stern thus took all the action in the New Jersey suit that was possible to protect the investors and to prevent the defendant from dissipating the funds in the Grand Cayman bank. This, together with the action of the prosecutors in the plea bargaining, has made the money available for return to the investors. It makes no difference at this point what the Grand Cayman bank would or would not have done had the defendant not taken the action he did as part of the plea agreement as the funds were remitted, and they are under the control of the Colorado court for the eventual return to investors. Both the New Jersey court and the Colorado court are trying to have as much money as possible returned to investors. There appears to be no reason why they cannot proceed on parallel paths made necessary by the unusual circumstances and the origin of each action.

Each of the groups of parties in the civil proceedings urge that they did the most to bring the defendant to justice, to determine where the invested funds had been deposited, and were otherwise diligent in pursuing their claims. However, we cannot decide these appeals on the basis of which of the parties is entitled to the most equitable consideration. Again we must hold that the trial, the plea bargain, the return of funds to the United States, the receivership and the probation have all been interdependent elements of the Colorado criminal

proceedings. It is one package for all practical purposes, and should be there concluded as such quickly and efficiently as possible.

We hold that the Colorado receivership is valid in all respects and the funds therein held are in no way subject to garnishment.

The application for a writ of prohibition is denied in Case 82-1948.

In 82-1944 we affirm the denial of motions to transfer the receivership funds to the New Jersey class action or to a receivership there created and otherwise affirm the trial court.

In 82-2044 and 82-2045 we affirm the order of the trial court quashing the writs of garnishment and the denial of relief to the movants.

In 82-2046 we also affirm the order of the trial judge refusing to transfer funds to New Jersey and otherwise affirm the orders of the trial judge.

APPENDIX C

No. 82-2045

ROBERT F. BROWN, ROBERT A. BRANDT and
RFB PETROLEUM, INC., a Texas Corporation.
Plaintiffs-Appellants,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE,
INC., a Colorado Corporation, R. STEVEN SPANGLER,
JAMES T. WILSON, ADRIAN DOYLE and ROBERT NORWOOD,
Defendants-Appellees.

No. 82-2046

ELIZABETH EKEN and WILLIAM JOHNSON,
Plaintiffs-Appellants,

v.

INTERNATIONAL MINING EXCHANGE, INC., et al.,
Defendants-Appellees.

This matter comes on for consideration of appellants' petitions for rehearing and suggestions for rehearing in banc in the captioned appeals.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decisions sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing in banc are denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS/Clerk

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APPENDIX D

MARCH TERM—March 28, 1983

Before Honorable Oliver Seth, Honorable James E. Barrett, and Honorable William C. Doyle, Circuit Judges

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No. 82-1948

ROBERT C. HERZFELD,

Petitioner,

v.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO and THE HONORABLE FRED M. WINNER,

Respondents.

No. 82-1994

UNITED STATES OF AMERICA,

Plaintiff,

v.

TRENTON H. PARKER, INTERNATIONAL MINING EXCHANGE, INC.,

Defendants,

ELIZABETH EKEN, as representative of the class of investors defrauded by Trenton H. Parker and International Mining Exchange, Inc.,

Appellant,

WILLIAM C. LAM,

Receiver-Appellee.

No. 82-2044

ROBERT C. HERZFELD,
Plaintiff-Appellant,

v.

TRENTON H. PARKER, ADRIAN DOYLE, JAMES T. WILSON, STEPHEN SPANGLER, ROBERT E. NORWOOD and INTERNATIONAL MINING EXCHANGE, a Colorado Corporation.
Defendants-Appellees.

No. 82-2045

ROBERT F. BROWN, ROBERT A. BRANDT and RFB PETROLEUM, INC., a Texas Corporation.
Plaintiffs-Appellants,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., a Colorado Corporation, R. STEVEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE and ROBERT NORWOOD,
Defendants-Appellees.

No. 82-2046

ELIZABETH EKEN and WILLIAM JOHNSON,
Plaintiffs-Appellants,

v.

INTERNATIONAL MINING EXCHANGE, INC., et al.,
Defendants-Appellees.

This matter comes on for consideration of appellants' motions for stay of mandates in the captioned appeals pending application to the Supreme Court for certiorari.

Upon consideration whereof, it is ordered that the mandates are stayed until April 27, 1983, pending certiorari, and that if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the

United States that appellants have timely filed a petition for writ of certiorari in the Supreme Court, the stays shall continue until final disposition by the Supreme Court.

/s/ Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

APPENDIX E

§ 3651 Suspension of sentence and probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on a probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsibile.

The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation: Provided, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

The court may require a person who is an addict within the meaning of section 4251(a) of this title [18 USCS § 4251(a)], or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201) [42 USCS § 201(q)], as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title [18 USCS § 4255] for all or part of the period of probation: Provided, That the Attorney General certifies a suitable program is available. If the Attorney General determines that the person's participation in the program should be

terminated, because the person can derive no further significant benefits from participation or because his participation adversely affects the rehabilitation of other participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

APPENDIX F

18 U.S.C. § 3579. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the Court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(g) If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by the United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action.

APPENDIX G

Rule 57, Rules of Court

(a) Rules by district courts. Rules made by district courts for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Court, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

(b) Procedure not otherwise specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

APPENDIX H

STATUTORY AND CONSTITUTIONAL PROVISIONS

Constitution of the United States of America Amendment 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.